As noted previously, the Bushton Compressor Station is the last point of input of gas into the main-line facilities. Under this plan, the service area north of the Bushton station, wherein more than 99 per cent of the jurisdictional sales are made, is divided into three zones which are as nearly equal as they can reasonably be so far as transmission distances are involved. Zone 1 embraces all sales requiring transmission to the point of delivery, including that made through lateral lines, for a distance of 191.0 miles beyond the Bushton station. Sales made at points south of the Bushton station, including sales in the so-called Argus System, also fall within Zone 1. All sales made on the west leg of the system requiring transmission up to a distance of 190.43 miles beyond the Zone 1 northern boundary and all sales made on the east leg of the system requiring transmission up to a distance of 190.15 miles beyond the Zone 1 boundary fall within Zone 2. Sales falling in Zone 3 require transmission for a maximum distance of 180.8 miles on the west leg and 183.0 miles on the east leg beyond the northern boundary of Zone 2. As estimated for the year 1954, jurisdictional sales in Zone 1 would amount to 2,508,100 Mcf or 1.07 per cent of the total of such sales, 103,620,800 Mcf or 44.17 per cent in Zone 2, and 128,459,300 Mcf or 54.76 per cent in Zone 3.

Under the procedures advocated by the Proponents of zoning for distributing the cost of service to the zones recommended by them, all costs except transmisson costs were allocated on a system-wide basis in the manner prescribed by the Commission in its Opinion No. 228, issued in an earlier proceeding involving increased rates of Northern, and used also in arriving at the settlement of other issues in this instant proceeding as heretofore mentioned. Costs associatcd with the operation of the trans-

mission main line facilities in Proponents proposed Zone 1 were likewise allocated by them to all customers, excepting those in the Argus System, on a system-wide basis, on the theory that these facilities are used for serving all customers. Costs associated with the branch or lateral lines located in that Zone 1 were assigned solely to the Zone 1 customers. Similarly, all costs associated with transmission plant located in their proposed Zone 2 were assigned by the Proponents solely to that zone, as they are not considered to be used in any way to provide service to Zone 1.

The Staff in distributing the total cost of service to the several zones, first determined the average weighted transmission miles required to haul purchased and produced gas, as estimated for the year 1954, from the various sources to a common point on the system, which was determined to be the Bushton Compressor Station, the last point of input. The number of transmission miles from the source of supply to each sales delivery point was then determined. Transmission demand miles were computed by multiplying the mileage thus obtained for each delivery point by the three-day system peak average sales at each such point. Transmission commodity miles were computed by the multiplying of the mileage to each delivery point by the annual sales made at that point. The data thus obtained was then grouped by zones and by classes of service.

Under the Staff's procedure, the unit cost of service on a system-wide basis was then determined for each function and allocated to zones and classes of service as follows: Production costs were allocated to all sales in proportion to the volume of annual sales; transmission costs were allocated by the computed demand and com-

modity Mcf-miles; distribution and customers' accounting and collecting costs were assigned to zones according to the number of sales delivery points; and sales promotion expense was allocated to zones in accordance with estimated annual volume of sales. Drilling and pumping sales were assigned transmission costs by Mcf-miles based upon the average distance of groups of such sales from the supply source.

We do not believe it either sound or reasonable to allocate costs in part on a system wide basis and in part on the basis of a segregation of certain properties as the Proponents have done. For the purposes of this case wherein we are attempting to arrive at a sound and equitable basis for establishing for the first time a differential in rates in separated areas of a system which has not heretofore had zone rates, we find the theory of the cost allocation procedure advocated by the Staff to be particularly appropriate. We further find, however, for the reasons stated below that certain modifications should be made to the precise manner in which it was applied by the Staff in this case.

The previously mentioned statement of settlement in this proceeding, which was approved by our order issued January 28, 1954, provided, among other things, as follows:

"SECTION VII

"Further Proceedings

"It is agreed that this settlement will dispose of all matters involved and issues presented in this proceeding, excepting the single issue respecting zones of service and differentials in rates between zones. It is further agreed that further hearings herein respecting such issue shall be had at the earliest practicable date and the cost of service hereinbefore set

forth and agreed upon for the purposes of this settlement shall be used to the extent that cost of service is involved.

"For the purposes of this settlement it is further agreed that the decision of the Commission respecting such issue of service zones and rates differentials, if it requires a change in the revised rate schedules filed pursuant to Section I hereof, shall not be made effective prior to December 27, 1954, nor result in revenues less than the agreed cost of service. It is also agreed that, if so required by decision of the Commission on further hearings herein, Northern shall incorporate in revised rate schedules filed to become effective on or after December 27, 1954, the methods and principles found by the Commission, subject to judicial review, to be proper as to zones and rate differentials, with due regard to the recovery of reasonable cost of service."

The total cost of service for the year 1954 agreed upon for the purpose of such settlement was $88,584,957, of which, it was further agreed, $73,083,254 was allocable to jurisdictional sales. There was also agreement in this settlement as to the allocation of such costs to the functions of production, transmission, distribution, customers' accounting and collecting and sales promotion.

In the preparation and presentation of evidence in the hearing in this matter, the Staff, of course, was bound by these provisions of the stipulation. Accordingly, in the allocation of costs to the several proposed zones the Staff used the costs as allocated to functions for the purpose of the settlement.

In the allocation so made for the purpose of the settlement the transmission costs of Permian Basin Pipeline Company, Northern's subsidiary and a supplier, were added to the transmission costs of Northern, although

the delivery of gas by Permian is made at the southern terminus of Northern's own system. While such an allocation was proper for the purpose of establishing rates on a system-wide basis, the transmission costs of Permian should not here be spread on a mileage basis but rather should be included with other production and supply costs and spread on the basis of sustained peak demand and annual sales. In the settlement allocation a part of the administrative and general expense was also assigned to the transmission function as were costs of transmission and compression of gas by others before entry into the transmission system facilities. Since these costs are not specifically related to the miles of gas transportation, they too should properly be distributed on the basis of sustained peak demand and annual sales.

We also find that the Staff's allocation of distribution and customers' accounting and collecting costs on the basis of sales delivery points produces wholly disproportionate results. Under this procedure the same amount of expense is attributed to the point of smallest volume of sales and requiring the smallest of metering and regulating equipment as is attributed to the largest of customers whose purchases require the most expensive metering and regulating equipment. Since the record does not provide a breakdown of these costs sufficient to determine the actual cost at each point of delivery, we find that it would be proper for the present purpose to distribute one-half of these costs according to the number of delivery points and one-half in the proportion of the volume of sales. In this manner, recognition would be given in part at least to the comparative size of the various markets served and to the varying costs related thereto. As so modified, we will utilize hereinafter the allocation procedure of the Staff.

As so modified we believe the cost allocation procedure proposed by the Staff to be most suitable for the purpose of this case, and we adopt it for this purpose.

Subsequent to the close of the hearing on the phase of the procedure here under consideration, Northern, on Juy 2, 1954, filed revised uniformly applicable rate schedules designed to provide an increase in revenues from jurisdictional sales of $8,128,405, or 10.4 per cent, annually over and above the revenues estimated to be produced by the rates allowed to become effective pursuant to the settlement and our order herein issued January 28, 1954. The proposed increase in rates was based on sales for the year ended March 31, 1954, as adjusted. In support of this increase, Northern relies principally on claimed costs of new plant facilities, the majority of which were not then estimated to go into service until September and October, 1954. The total cost of service claimed by Northern in this filing is $103,533,908, as contrasted to the amount of $88,584,957 stipulated as the cost of service to be used for the purpose of the hearing in this instant proceeding.

By order issued July 29, 1954, at Docket No. G-2505, we suspended and deferred the use until December 27, 1954, of the increased schedules filed July 2, 1954. Thereafter, pursuant to proper motion of Northern, the suspended schedules were allowed to become effective as of December 27, 1954, subject, however, to the condition, among others, that Northern shall refund, with interest, the portion of such increased rates or charges as the Commission may by its decision in that proceeding find not justified. Since the proceedings have not been concluded and a decision has not been made in the matter at Docket No. G-2505, the increased rates are now be-

ing collected, subject to possible refund of a portion thereof.

Considering the lapse of time occasioned by necessary procedures in this case and the facts recited above, it would be inappropriate and improper to now require by order in this proceeding that Northern file substitute revised tariff sheets to be made effective as of a retroactive date or based upon a cost of service less than that claimed by Northern in its previously mentioned filing of July 2, 1954.

Of the total cost of service claimed in support of the filing of July 2, 1954, Northern has allocated $86,538,101 to the jurisdictional sales. However, the procedures used by Northern in making such allocation are unlike those prescribed by the Commission in its Opinion No. 228 in earlier proceedings concerning Northern's rates, which were followed also in the settlement of the other aspects of this instant matter.

Using the claimed jurisdictional cost of service of $86,538,101, but applying thereto the principles and methods of cost classification and allocation hereinbefore found to be proper, we obtain the following results:

	Rate Schedule CD-1			Average Cost		
	Demand Charge	Commodity Charge	Over-run Commodity Charge	70 Per Cent Load Factor	80 Per Cent Load Factor	100 Per Cent Load Factor
Zone 1	$0.94	22.93¢	22.93¢	27.41¢	26.85¢	26.06¢
Zone 2	$2.00	23.80¢	23.80¢	33.32¢	32.13¢	30.47¢
Zone 3	$2.08	26.48¢	26.48¢	36.38¢	35.14¢	33.41¢

The estimated volumes of sales for resale shown in the new rate filing of Northern reflect an annual load factor for this class of sales of about 70 per cent. At this load factor, it will be noted, the differential in average cost to the purchasers in Zones 2 and 3 is shown in the tabulation to be 3.06 cents per Mcf. Considering, how-

ever, that this differential is calculated on the basis of the total cost claimed by Northern, which in certain respects at least is not in accord with prior decisions of the Commission in proceedings involving rates of Northern, and the fact that past experience indicates the possibility that Northern may not be able to fully support its claimed cost of service, we are of the opinion that the maximum differential in rates to be made effective at this time on an interim basis, subject to subsequent adjustment and possible refund, should be about 2.00 cents per Mcf. This differential is the difference in average cost per Mcf purchased at a load factor of 70 per cent. The following tabulation reflects a recasting of the rates shown in the previous tabulation to produce a differential between Zones 2 and 3 of 2.04 cents per Mcf, which is as close as can be computed:

	Rate Schedule CD-1		Over-run	Average Cost Per Mcf		
	Demand Charge	Commodity Charge	Commodity Charge	70 Per Cent Load Factor	80 Per Cent Load Factor	100 Per Cent Load Factor
Zone 1	$1.75	23.5¢	23.5¢	31.83¢	30.79¢	29.33¢
Zone 2	$2.00	24.3¢	24.3¢	33.82¢	32.63¢	30.97¢
Zone 3	$2.07	26.0¢	26.0¢	35.86¢	34.63¢	32.90¢

As previously noted, the parties opposed to zoning, including Northern, contend that an increase in rates will result in the loss of industrial sales to competitive fuels by some of Northern's customers. In deference to this position, Northern, in its rate filing of July 2, 1954, proposed no increase in the commodity component of its rate and instead increased only the demand component.[19]

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19 In explanation, Northern states in its rate filing of July 2, 1954 that:

> "In order that a favorable competitive position be maintained for large volume loads, it is the judgment of Northern's management that the commodity charge under Rate Schedule CD-1 should not be increased at this time. Accordingly, the commodity charge has been retained at the present level of 22.1¢ per Mcf and the demand charge increased from $2.21 to

(Continued to next page)

Furthermore, by such filing, Northern proposed the elimination of the differential of 2 cents per Mcf heretofore added to the commodity component to arrive at the rate for the purchase of "over-run gas," being volumes in excess of the contracted demand.[19] We find the evidence on this point of contention something less than convincing. No evidence whatsoever in this respect was offered by Northern States Power Company, an intervener herein and an active opponent of zoning, which is undoubtedly the largest consumer of industrial gas supplied by the Northern system and certainly well provided with information and data as to the costs of purchasing and handling other competitive fuel. However, the proceedings at Docket No. G-2505 will provide a further opportunity to develop evidence on this point. Furthermore, experience under zone rates pending disposition of those proceedings will give further indication of the probable future trend of industrial sales of natural gas in the area served by Northern. All of which can be given consideration in the decision in the proceedings at said Docket No. G-2505, including the fixing of the level of rates in each zone. Accordingly, at this time we will permit Northern, if it chooses so to do, to maintain in the rate schedules filed pursuant to the order in this instant matter a uniform commodity charge throughout its system, and to adjust the demand component of the rates to provide a differential between zones of approximately

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(Continued from preceding page)

> $2.70 per Mcf of billing demand in order to recover cost of service. * * *
>
> "The same considerations have led Northern's management to propose that the overrun price of 24.1¢ per Mcf in the presently effective R-1 Rate Schedule be reduced to 22.1¢ per Mcf, the same as the commodity charge under Rate Schedule CD-1."

2.00 cents per Mcf at a 70 per cent load factor as indicated in the tabulation last above.

As their final point of argument, the parties designated as the Opponents appear to suggest, although they do not so state, that the proviso of Section 5(a) of the Natural Gas Act precludes the Commission from requiring Northern by order to establish service zones and rate differentials. This proviso, however, does not preclude the Commission from granting the relief sought in this proceeding.[20] To hold otherwise would do violence to the purpose and object of the legislation.

Undue discrimination or preference, as found to exist by reason of the present rate practice of Northern, may be eliminated in several ways, of which an increase in rates for certain service is only one. Section 5(a) specifically provides also that "the Commission may order a decrease where existing rates are unjust, unduly discriminatory, preferential, otherwise unlawful, or are not the lowest reasonable rates." It would also be quite proper for the Commission, upon the finding of undue discrimination or preference under the facts of this case, to determine appropriate zones of service and require Northern to file appropriate rates which would not be unduly discriminatory or preferential.[21] And the Commission may, as we do here, in the circumstances of a par-

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20 **In Michigan Consolidated Gas Company v. Panhandle Eastern Pipe Line,** 173 F. 2d 784, 789, the Court of Appeals said:

> "Whatever may be the limits placed by the [Natural Gas] Act upon the authority of the Commission in other respects, it is clear that under §717c(b) [Sec. 4(b)] the authority of the Commission, in respect to undue preferences or advantages is without limitation."

21 **Federal Power Commission, et al., v. Natural Gas Pipeline Company, et al.,** 315 U. S. 575, 583-585.

ticular case merely determine and fix the differential in rates that is reasonable and necessary to eliminate existing unlawful discrimination and preference, leaving to the company the decision as to how such differential shall be incorporated into its rate schedules. As the Supreme Court has said:[22]

> "The Constitution does not bind rate-making bodies to the service of any single formula or combination of formulas. Agencies to whom this legislative power has been delegated are free, within the ambit of their statutory authority, to make the pragmatic adjustments which may be called for by particular circumstances."

The Commission further *finds*, for the reasons given and upon the findings hereinbefore set forth:

(1) Northern Natural Gas Company, a corporation organized and existing under the laws of the State of Delaware, is engaged in the transportation of natural gas in interstate commerce and in the sale in interstate commerce of such gas for resale, and is, therefore, a "natural-gas company" within the meaning of the Natural Gas Act.

(2) The demanding, charging, and collecting by Northern of uniform rates and charges for all sales of natural gas by it, subject to the jurisdiction of the Commission, is unduly discriminatory and preferential, and, therefore, unlawful.

(3) The establishment of zones of service with proper differentials in the rates and charges applicable to sales in the respective zones, subject to the jurisdiction of the Commission, would be the most effective and equitable means of fixing rates and charges which would be not unduly discriminatory or preferential.

---

22 Idem. Page 586.

(4) Northern should be required to file appropriate revisions to its FPC Gas Tariff to provide for the division of its system into three rate zones bounded in the manner and at the locations specifically shown on the map following page 26 hereof, as hereinafter ordered and conditioned.

(5) The statement of settlement of the issues in this proceeding other than those respecting service zones and rate differentials, which was agreed to by Northern and all other parties and approved by the Commission, provides, among other things, that:

"SECTION VII

* * *

"For the purposes of this settlement it is further agreed that the decision of the Commission respecting such issue of service zones and rate differentials, if it requires a change in the revised rate schedules * * *, shall not be made effective prior to December 27, 1954, nor result in revenues less than the agreed cost of service. It is also agreed that, if so required by decision of the Commission on further hearings herein, Northern shall incorporate in revised rate schedules to become effective on or after December 27, 1954, the methods and principles found by the Commission, subject to judicial review, to be proper as to zones and rate differentials, with due regard to the recovery of reasonable cost of service."

(6) The adjusted total cost of service agreed upon in the above-mentioned approved settlement was $88,584,957 for the twelve-months' period ending December 27, 1954, the test period, of which amount, it was further agreed, $73,083,254 was properly allocable to jurisdictional sales.

(7) On July 2, 1954, Northern filed certain revised sheets to its FPC Gas Tariff proposing an in-

crease in rates and charges of $8,128,405 annually over and above the rates and charges allowed to become effective as of December 27, 1953, pursuant to said approved settlement. These proposed increases were based upon estimated sales for the year ended March 31, 1954, as adjusted, and a claimed over-all cost of service for that period of $103,533,908. Of this total Northern has allocated $86,538,101 to the jurisdictional sales.

(8) By order issued July 29, 1954, at Docket No. G-2505, the Commission suspended and deferred the use until December 27, 1954, of the said revised sheets filed on July 2, 1954. Thereafter, by order issued January 7, 1955, upon proper motion of Northern, said revised sheets and increased rates and charges were allowed to take effect as of December 27, 1954, subject to such refunds as might be thereafter ordered by the Commission.

(9) In view of the facts set forth in paragraphs (6), (7), and (8) hereinbefore, it would be inappropriate to now require by order in this proceeding that Northern file substitute revised tariff sheets to be made effective as of a retroactive date or based upon a total cost of service less than that claimed by Northern in its previously mentioned filing of July 2, 1954.

(10) Northern should be required to file with the Commission revised sheets to its FPC Gas Tariff, satisfactory to the Commission, containing schedules of rates and charges which would produce from sales for resale in the herein defined Zone 1 an average revenue approximately 2.00 cents per Mcf less than the average revenue from similar sales in Zone 2, and an average revenue from sales for resale in Zone 2 approximately 2.00 cents per Mcf less than the average revenue from similar sales in Zone 3, but said differentials in

average revenues shall be not less than 1.95 cents per Mcf: *Provided, however,* that the design of said schedules of rates and charges shall be based on the billing determinants for sales for resale as estimated by Northern for the purpose of its aforementioned filing of July 2, 1954, and the required differentials in average revenue should be as computed at sales equivalent to use each month of contract demand at a 70 per cent load factor: And, *provided further,* that the design of said schedules of rates and charges shall be based upon a cost of service for jurisdictional sales not to exceed $86,538,101.

(11) The revised tariff sheets to be filed as contemplated by paragraphs (4) and (10) hereinbefore should be made effective as of May 27, 1955, for all sales of gas by Northern for resale, subject to such refunds as may be hereafter ordered by the Commission in the aforesaid proceedings at Docket No. G-2505; and said revised tariff sheets as of that date should be substituted for First Revised Sheets 5, 6, and 7 to Northern's FPC Gas Tariff, Original Volume No. 1, which became effective as of December 27, 1954, subject to such refunds as may be hereafter ordered by the Commission.

The Commission *orders*:

(A) Northern, within fifteen (15) days from the Date of issuance hereof, shall file with the Commission revisions to its FPC Gas Tariff, satisfactory to the Commission, to provide for the division of its natural-gas transmission system into three zones bounded in the manner and at the locations specifically shown on the map following page 26 hereof.

(B) Northern, within fifteen (15) days from the date of issuance hereof, shall file with the Commission revised sheets to its FPC Gas Tariff,

satisfactory to the Commission, containing schedules of rates and charges which would produce from sales of gas for resale in the heretofore prescribed Zone 1 an average revenue approximately 2.00 cents per Mcf less than the average revenue from similar sales in Zone 2, and an average revenue from sales for resale in Zone 2 approximately 2.00 cents per Mcf less than the average revenue from similar sales in Zone 3: *Provided, however,* that said differentials in average revenue shall be not less than 1.95 cents per Mcf. The design of said schedules of rates and charges shall be based on the billing determinants for sales for resale as estimated by Northern for the purpose of its aforementioned filing of July 2, 1954, and the required differentials in average revenue shall be as computed at sales equivalent to use each month of contract demand at a 70 per cent load factor.

(C) The schedules of rates and charges in the revised tariff sheets to Northern's FPC Gas Tariff to be filed pursuant to paragraph (B) above shall be designed so as to produce to Northern total revenues from sales of natural gas, subject to the jurisdiction of the Commission, not to exceed $86,538,101, based upon sales for the year ended March 31, 1954, as adjusted, as estimated by Northern for the purpose of the aforesaid filing of July 2, 1954.

(D) The revised tariff sheets filed pursuant to paragraphs (A), (B), and (C) above shall be effective as to all sales of gas, subject to the jurisdiction of the Commission, made on and after May 27, 1955, subject to such refunds as may be hereafter ordered by the Commission in the aforesaid proceedings at Docket No. G-2505.

(E) The revised tariff sheets filed pursuant to paragraphs (A), (B), and (C) above shall be sub-

stituted as of May 27, 1955, for First Revised Sheets 5, 6, and 7 to Northern's FPC Gas Tariff, Original Volume No. 1, which became effective as of December 27, 1954, subject to such refunds as may be hereafter ordered by the Commission in the aforesaid proceedings at Docket No. G-2505.

By the Commission. Commissioners Draper and Smith dissenting in part.

LEON M. FUQUAY,
Secretary.

Adopted: May 19, 1955

Issued: May 20, 1955

In the Matter of
Northern Natural Gas Company } Docket No. G-2217

DRAPER and SMITH, *Commissioners*, dissenting in part:

We concur fully in the conclusion of the Commission that Northern's uniform, system-wide rate structure results in undue discrimination. This, we agree, should be removed by the creation of the rate zones provided for herein and the establishment of rates which will reasonably reflect the relative costs of service within each zone.

According to the allocation method adopted in this case, the differential in average costs between Zone 2 and Zone 3 is 3.06 cents per Mcf, based on Northern's most recent estimate of sales for resale at an annual load factor of 70 per cent. We do not hold that allocated costs should be followed slavishly in designing rates. We recognize, furthermore, that, when departures from historical rate patterns are to be made, some softening of the impact may be appropriate. We are not convinced by the evidence in this record, however, that there is reason for the majority's reduction of the indicated differential between Zones 2 and 3 from 3 cents per Mcf to 2 cents.

In our view it would be more equitable to establish an initial differential of 2½ cents. This would be subject to further consideration and adjustment in Docket No. G-2505 should the evidence therein show that such differential should be modified.

Claude L. Draper, Commissioner

Nelson Lee Smith, Commissioner

Filed: May 19, 1955
Issued: May 20, 1955

APPENDIX C

(Judgment.)

UNITED STATES COURT OF APPEALS
FOR THE
EIGHTH CIRCUIT

September Term, 1955.
Monday, July 9, 1956.

No. 15412

Interstate Power Company, Northern States Power Company, Western States Utilities Company, Minnesota Valley Natural Gas Company, North Central Public Service Company, Kansas City Power & Light Company (Peoples Gas & Electric Division), Minneapolis Gas Company, State of Minnesota, City of St. Paul, Minnesota, and City of Minneapolis, Minnesota.

Petitioners,

vs.

Federal Power Commission.

No. 15424

Northern Natural Gas Company, a Corporation,

Petitioner,

vs.

Federal Power Commission.

Petitions to Review, Set Aside and Reverse Order of the Federal Power Commission.

These matters came on to be heard on the Petitions to review, set aside and reverse an Order of the Federal Power Commission on its Opinion No. 281, in Docket No. G-2217, issued May 20, 1955, and were argued by counsel.

On Consideration Whereof, It is now here Ordered and Adjudged by this Court that the Opinion and Order of the said Federal Power Commission in these matters be, and the same are hereby, affirmed. Opinion this day filed.

July 9th 1956.

APPENDIX D

Excerpts from Administrative Procedure Act, Legislative History, 79th Congress, 1944-46:

Senate Judiciary Committee Print, June, 1945 (pp. 31-32):

(d) *Record.—The transcript of testimony and exhibits, together with all papers and requests relating to the hearing, shall constitute the exclusive record for decision in accordance with section 8 and, upon payment of lawfully prescribed costs, be made available to the parties. Where any agency decision rests on official notice of a material fact not appearing in the evidence in the record, any party shall on timely request be afforded an opportunity to show the contrary.*

Explanation

This subsection provides that administrative hearings shall be reduced to a record, and made available to all parties. The statement of the exclusiveness of the record of the administrative hearing is a necessary recognition that upon it, and no other evidence, the further administrative proceedings must be had, the final administrative decision made, and judicial review be confined. Unless the record is so recognized as exclusive, the purpose and value of the hearing may be rendered nil, for it is only the record that informs the parties of the evidence for or against them. The rule of official notice is that recommended by the Attorney General's Committee, particularly the safeguard that parties be apprised of matters so noticed and accorded an "opportunity for reopening of the hearing in order to allow the parties to come forward to meet the facts intended to be noticed."

Report of the Senate Committee on the Judiciary (p. 209):

(d) *Record.—The record of evidence taken and papers filed is exclusive for decision and, upon payment of costs, is available to the parties. Where decision rests on official notice of a material fact not appearing in the evidence of record, any party may on timely request show the contrary.*

The "official notice" mentioned relates to the administrative practice of taking facts as shown and true though not in the record. This is done by analogy to judicial notice familiar in court procedure. Where agencies take such notice they must so state on the record or in their decisions and then afford the parties an opportunity to show the contrary.

Report of the House Committee on the Judiciary (pp. 271-272):

SECTION 7 (D). RECORD OF HEARINGS

The record of evidence taken and papers filed is exclusive for decision and, upon payment of costs, is available to the parties. Where decision rests on official notice of a material fact not appearing in the evidence of record, any party may on timely request show the contrary.

The "official notice" mentioned relates to the administrative practice of taking facts as shown and true though not in the record. This is done by analogy to "judicial notice" familiar in court procedure. Where agencies take such notice they must so state on the record or in their decisions and then afford the parties an opportunity to show the contrary. But such notice may initially be taken only of generally recognized and ordinarily indisputable facts—usually those of a scientific or public nature.

Record of House Proceedings, May 24, 1946 (p. 365):

RECORD, SECTION 7 (D)

The final subsection of section 7 provides that the record of the evidence taken and the papers filed

is exclusive for purposes of decision. It also provides that, where a decision rests in whole or part on official notice of a material fact not appearing in the record, any party must on timely request be given an adequate opportunity to show the true facts.

Both of these provisions are important. The exclusiveness of the record precludes deciding officers from basing their judgments as to the facts upon matters which are not in the record. The provision respecting official notice is essential in order to prevent miscarriage of justice through mistake or by unwarranted expansion of the idea of judicial notice.

In the Supreme Court of the United States

OCT 23 195
JOHN T. FEY, Cl

OCTOBER TERM 1956

No. 459

INTERSTATE POWER COMPANY, et al.,
Petitioners,

vs.

FEDERAL POWER COMMISSION,
Respondent.

No. 476

NORTHERN NATURAL GAS COMPANY,
Petitioner,

vs.

FEDERAL POWER COMMISSION,
Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

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COCKLE PRINTING COMPANY, LAW BRIEFS, OMAHA

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MISCELLANEOUS

Federal Power Commission Opinion and Order No. 281, 9 P. U. R. 3d 8 (opinion found in Appendix A, Petition for Writ No. 459, and Appendix B, Petition for Writ No. 476) 15, 18, 26

In the
Supreme Court of the United States

OCTOBER TERM 1956

No. 459

INTERSTATE POWER COMPANY, et al.,
Petitioners,

vs.

FEDERAL POWER COMMISSION,
Respondent.

No. 476

NORTHERN NATURAL GAS COMPANY,
Petitioner,

vs.

FEDERAL POWER COMMISSION,
Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

BRIEF FOR INTERVENORS AS RESPONDENTS IN OPPOSITION

OPINIONS BELOW

The order and opinion of the Federal Power Commission is reported in 9 P. U. R. 3rd 8 (R. 91-133). The opinion of the Court of Appeals for the Eighth Circuit is reported in 236 Fed. 2nd 372 (R. IV., 18-47).

We believe that the petitioners have set forth sufficient information as to jurisdiction and the statutes involved, thus making it unnecessary for us to repeat the same here.

We do, however, feel that it would be well to supplement and clarify the statement of petitioners, and to re-

state the questions which we believe are presented in one or the other or both of the petitions.

QUESTIONS PRESENTED

QUESTION I.

Does the Commission, having found Northern's uniform system-wide rate filed to be unlawful, discriminatory and preferential, have the power and duty to correct and remove such unlawful discrimination and preference, by directing Northern to file new rate schedules?

(Northern neither raises nor argues this question.)

QUESTION II.

Should this Court review an interim order of the Commission with reference to zone boundaries and rate differentials, even though the Commission may have considered some record evidence from another companion and related docket involving all parties hereto, where petitioners have failed to show any aggrievement or prejudice?

QUESTION III.

Does the decision of this Court in *Colorado Interstate Gas Company v. Federal Power Commission* (1945), 324 U. S. 581, affirming the Federal Power Commission decision on issues of fact which were wholly different than those in this case, warrant the granting of a writ of certiorari?

STATEMENT

Northern's practice of charging uniform system-wide rates to all of its resale customers had been an issue in rate proceedings before the Federal Power Commission since 1950, when Council Bluffs Gas Company challenged the uniform system-wide rates of Northern Natural Gas Company as preferential and unlawfully discriminatory. The Commission at that time deferred decision on the zone rate question. After Northern, on June 26, 1953, filed its application (Docket G-2217) to increase its uniform system-wide rates and charges (R. I. 93, 97), Council Bluffs Gas Company, Central Electric and Gas Company and the Metropolitan Utilities District of Omaha, all of which are principal customers of Northern, served notice of their intention to explore the issues respecting the establishment of zones and rate differentials between zones (R. I. 97).

The proposed increased rates in Docket G-2217 were suspended for the maximum period of five months allowed by the Natural Gas Act and thereafter became effective, subject to refund, on December 27, 1953 (R. I. 93). During the progress of the hearings and on January 21, 1954, following conferences among the parties to the proceedings, final agreement was reached on all issues except the issue of zones and zone rate differentials (R. I. 93).

The agreement of the parties and the order of the Commission provided, among other things, that further hearings "shall be had at the earliest practicable date" on "the single issue respecting zones of service and differentials in rates between zones" (R. I. 149, 155, 166). It was

further agreed that any Commission decision respecting service zones and rate differentials "shall not be made effective prior to December 27, 1954" and that any "revised rate schedules filed to become effective on and after December 27, 1954" should reflect "the methods and principles found by the Commission * * * to be proper as to zones and rate differentials * * *."

Pursuant to such agreement and order, sixteen days of hearings were held solely on the zone rate issue, concluding in June of 1954. In these hearings the zone issue was explored comprehensively. A record of over 2,000 pages of transcript and 46 exhibits was made on this single issue. The Commission found that there was "ample evidence at this time upon which to reach a decision, unlike the inadequate state in which we found the record in earlier proceedings where the zoning question was first broached." (R. I. 98.)

On May 20, 1955, the Commission issued its Opinion No. 281 and accompanying order by which it found that the use of uniform system-wide rates by Northern for its entire 800-mile natural gas pipeline is "unduly discriminatory and preferential" and directed Northern to divide its system into three zones with different rates for each zone (Appendix A of Petition for Writ No. 459).

Actually the zoning plan adopted by the Commission was substantially the plan recommended by the Commission Staff with minor modifications.

Zone 1 as prescribed by the Commission embraces all sales requiring transmission for a distance of 191 miles beyond Bushton, Kansas, and also includes all sales made

south of Bushton. Zone 2 embraces all sales made on the east and west legs of the main transmission line up to approximately 190 miles beyond Zone 1. Zone 3 includes all sales requiring transmission for a maximum of approximately 180 miles on the west and 183 miles on the east legs of the main transmission line beyond the northern boundary of Zone 2 (R. I. 116-119, including map).

The Commission ordered Northern to file revised rate schedules to be effective as of June 27, 1955, providing for a 2c per Mcf differential between each zone with the lowest rate in Zone 1 and the highest in Zone 3 (R. I. 130-132).

This was to be only an *interim* rate subject to subsequent adjustment and possible refund (R. I. 124).

The Commission was unanimous in:

1. Finding that Northern's uniform rates were unduly discriminatory and preferential, and therefore, unlawful.
2. Finding that the establishment of zones with proper differentials in rates was necessary to eliminate this discrimination.
3. Establishing the three zones and fixing their boundaries.
4. Finding the differential in average cost of service between Zones 2 and 3 to be 3.06c per Mcf (R. I. 124, 128, 132).

The majority opinion concluded that a differential in rates between zones of only 2c per Mcf should be made

effective "at this time on an interim basis, subject to subsequent adjustment and possible refund." (R. I. 124.)

With respect to the rate differential of 2c per Mcf, Commissioners Draper and Smith dissented, asserting that the indicated cost difference is 3.06c per Mcf from zone to zone and that an initial rate differential of 2½c per Mcf "would be more equitable" even if it be recognized that "some softening of the impact may be appropriate." (R. I. 132-133.)

Northern, as required by the Commission order, filed revised rate schedules to reflect the prescribed service zones and zone rate differentials, effective June 27, 1955 (R. I. 228-230).

A petition for review of the Commission's order was filed in the United States Court of Appeals for the Eighth Circuit on August 19, 1955. On July 9, 1956, the Court of Appeals affirmed the order of the Commission in its entirety and entered judgment thereon. *(Interstate Power Company, et al. v. Federal Power Commission,* 236 Fed 2d 372; *Northern Natural Gas Company v. Federal Power Commission,* 236 Fed. 2nd 372, shown as Appendix B of the petition No. 459.)

ARGUMENT

QUESTION I.

After extended hearings and much evidence the Commission found that Northern's uniform system-wide rates resulted in undue discrimination and preference to some of Northern's customers, and thus such rates were un-

lawful. The United States Court of Appeals for the Eighth Circuit found there was evidence to support such determination. No claim to the contrary is made here by petitioners.

Under their first question, petitioners seek to avoid the consequence of such findings and determination and ask for the continuance of such undue, discriminatory and preferential rates by claiming that the Commission is powerless to correct such illegal preference and discrimination.

The petitioners make the contention in No. 459 (not joined in by Northern in No. 476) that the Commission's order results in an increase in rates which violates the proviso of Section 5 (a) of the Natural Gas Act. There are several answers to Petitioners' argument.

First, there is no increase involved. The Commission's order does not increase the total revenues provided by Northern's effective rate schedule on file with the Commission in Docket No. G-2505. Section 5 (a)'s proviso does not prohibit every rate increase. *Alabama-Tennessee Natural Gas Company v. Federal Power Commission*, 203 F. 2d 494, 501. The prohibition has reference to total revenues but has no reference to increases within the same total level of revenues to eliminate undue discrimination and preference. The terms of the proviso reveal that it is the totality of revenues derived under a rate schedule that is the criterion and not the revenue impact on particular customers.

Second, the settlement agreement entered into by all of the parties to this action provided that Northern should

file revised rate schedules to conform to "the methods and principles found by the Commission, subject to judicial review."

The settlement agreement reads in part as follows:

> "For the purposes of this settlement it is further agreed that the decision of the Commission respecting such issue of service zones and rate differentials, if it requires a change in the revised rate schedules * * *, shall not be made effective prior to December 27, 1954, nor result in revenues less than the agreed cost of service. It is also agreed that, if so required by decision of the Commission on further hearings herein, Northern shall incorporate in revised rate schedules to become effective on or after December 27, 1954, the methods and principles found by the Commission, subject to judicial review, to be proper as to zones and rate differentials, with due regard to the recovery of reasonable cost of service." (R. I. 128, 129.)

Pursuant to such agreement the zone rate hearings were held and pursuant thereto the Commission entered the order herein assailed.

The action taken and the order entered by the Commission was in accordance with the agreement between *all* the parties.

Third, the authority of the Commission in respect to undue preference or advantages is without limitation.

In *Montana-Dakota Utilities Co. v. Federal Power Commission*, 169 F. 2d 392, 399, C. A. 8th, Cert. denied 335 U. S. 853, it is said:

> "Under these circumstances no feasible plan is suggested to eliminate discrimination, and it does not

> appear that any effective regulatory rate order could be entered to achieve that result, without including the entire system. Moreover, section 5 (a) of the Natural Gas Act does not prescribe an exclusive means or method to be applied by the Commission for removing a discriminatory rate or practice. On the other hand, section 5 (a) of the Natural Gas Act provides that when discrimination is found to exist the Commission 'shall determine the just and reasonable rate, charge, classification, rule, regulation, practice, or contract to be thereafter observed and in force, and shall fix the same by order. * * *' We hold that the Commission's powers are adequate under the circumstances shown here to enter its order prescribing a rate schedule for petitioner's entire connected interstate system."

Likewise, in *Michigan Consolidated Gas Co. v. Panhandle Eastern Pipe Line Co.*, C.A. 6th (1949), 173 F. 2d 784, 789, the Court held:

> "Whatever may be the limits placed by the Act upon the authority of the Commission in other respects, it is clear that under Sec. 717c (b) the authority of the Commission, in respect to undue preferences or advantages, is without limitation."

The Court of Appeals in its opinion herein discussed this question at some length and concluded the rule to be that "there is and can be no question that the Commission was given the power under the Act to determine whether or not a natural gas company's uniform rates are unduly discriminatory, and it is equally clear that where such discrimination is found to exist, the Commission was empowered to eliminate it by establishing zones and rate differentials."

If the Commission in this case could not enter the order in question then the whole proceeding agreed to by

the parties was nothing but a farce. There would be no reason to provide for a hearing and findings of discrimination if the Commission were not empowered to correct such unlawful rates.

Finally, the Commission ordered no increase which was not "in accordance with a new schedule filed by such natural gas company" (Section 5 (a)). The Commission determined the appropriate zones of service and the appropriate differential in rates necessary to eliminate the unlawful discrimination and preference, leaving to Northern the incorporation of the differential in the rate schedule to be filed. There is no bar in Section 5 (a) against this procedure. It is, in fact, the procedure followed by the Commission in the Atlantic Seaboard Corporation case (94 P. U. R. (N. S.) 235), to increase a rate found to be below a just and reasonable rate.

Having properly found that the existing rate was unlawful it then became incumbent upon the Commission to correct such unlawful situation. It was never intended that Section 5 (a) should prevent the correction of such unlawful rates.

QUESTION II.

Having found that the application of Northern's uniform, system-wide rate produced unlawful discrimination and preference, the Commission observed that theoretically (R. I. 111-113), "the ideal, non-discriminatory, and non-preferential rate structure would be one designed to assess each point of sale and delivery with the total of the various cost components incurred in the rendering of service to each point. But any attempt to arrive at

such perfection would be not only delusory, but also impracticable and infeasible from both the management and regulatory point of view." The Commission, therefore, found the establishment of service zones with rate differentials was the only practical, reasonable and equitable remedy therefor and turned its attention to the task of fixing the service zones.

There is, of course, no pat answer to the selection of service zones. For its solution there is no ready formula available. Like the related problem of allocation of costs, the establishment of service zones:

> "is not a matter for the slide rule. It involves judgment on a myriad of facts. It has no claim to an exact science." (*Colorado Interstate Gas Co. v. Federal Power Commission*, 324 U. S. 581, 589.)

It involves, also, like cost allocations, "the exercise of judgment and discretion by those whose duty it is to make the 'pragmatic adjustments * * * called for by the particular circumstances.'" *Cities Service Gas Co. v. Federal Power Commission*, 155 F. 2d 694, 705 (C. A. 10), cert. denied, 329 U. S. 773. As in the case of the allocation of costs, so too with respect to the zones established, the fact that the service zones are "not free from defects or imperfections in all (their) aspects" is of no moment if "it cannot be said that as the consequence," the zones established produce arbitrary results or overstep the bounds of due process. *Colorado Interstate Gas Co. v. Federal Power Commission*, 142 F. 2d 943, 959 (C. A. 10) affirmed, 324 U. S. 581. The service zones pass these tests.

In this case there was available to the Commission a comprehensive presentation by Central Electric, Council Bluffs and Omaha Metropolitan Utilities District and the Commission's Staff of five possible plans for zoning Northern's system. These plans were carefully reviewed by the Commission (R. I. 114-116), and after analysis of each of them the Commission concluded (R. I. 116):

> "* * * that the most appropriate and practicable method would be the establishment of three zones on Northern's system with zone boundaries as depicted on the map following this page. * * * This plan, in our view, provides the most effective and equitable basis for eliminating the present unlawful discrimination and preference.
>
> "As noted previously, the Bushton Compressor Station is the last point of input of gas into the mainline facilities. Under this plan, the service area north of the Bushton station, wherein more than 99 per cent of the jurisdictional sales are made, is divided into three zones which are as nearly equal as they can reasonably be so far as transmission distances are involved. * **"

Petitioners attack the Commission's zoning plan on several grounds. They contend that the plan adopted by the Commission was first proposed and first made known to them in Opinion No. 281 and that they have thereby been deprived of an opportunity to be heard on the zone plan adopted by the Commission, which constitutes a denial of due process of law. They contend also that the three-zone plan adopted by the Commission is not supported by substantial evidence. There is no merit to either contention.

Respecting the due process contention,—it is predicated on the curious proposition that the Commission is

bound to select one of the plans proposed, and exactly as proposed, or choose none at all, even if an unlawful discriminatory and preferential condition is left unremedied. To state the proposition is to expose its fallacy.

The Commission has been entrusted by Congress "with the power to draw inferences from the facts" and it "has the function of appraising conflicting and circumstantial evidence, and the weight and credibility of testimony." *National Labor Relations Board v. Link-Belt Co.*, 311 U. S. 584, 597. The Commission's "function is not only to appraise the facts and to draw inferences from them but also to bring to bear upon the problem an expert judgment." *United States v. Detroit & Cleveland Navigation Co.*, 326 U. S. 236, 241. The Commission's estimates, predictions, directives and findings need not follow any particular testimony and it may draw conclusions from the facts without the aid of the judgment of experts. *Market Street R. Co. v. Commission,* 324 U. S. 548, 559-560. The Administrative Procedure Act has not changed this. If the plan adopted by the Commission is supported by substantial evidence, there is no question of due process or error of any kind involved.

The three-zone plan prescribed by the Commission is supported by substantial evidence. The Commission studied the various proposals, applied the reasoning of the various experts and, taking all factors into consideration, ordered zone boundaries which were in its opinion the most fair and equitable.

This finding by the Commission was approved and affirmed by the United States Court of Appeals for the

Eighth Circuit as a question of fact supported by substantial evidence.

The zoning plan adopted by the Commission was the plan recommended by the Commission Staff in its brief and in oral argument before the Commission, modified only to meet the objections voiced by the petitioners during the hearings.

The zone boundaries advocated by the Staff placed the boundaries at compressor stations. Because of the fact that lateral lines of considerable length take off from the suction side of the designated compressor stations, several communities required to pay the highest zone rates would be located a lesser pipeline distance from the fields than some required to pay a lower zone rate. The Petitioners objected to this situation throughout the proceedings.

The Commission remedied this situation by locating the boundaries strictly on a mileage basis. This resulted in only a minor adjustment in the Staff's recommended zone boundaries.

Petitioners contend that the Commission in basing the 2c per Mcf differential in rates on Northern's claimed cost as set forth in its rate filing in Docket No. G-2505 went outside of the record in this case and thereby deprived them of due process of law. It is also contended that the Commission violated Section 7 (d) of the Administrative Procedure Act by taking official notice of certain extra-record data without giving the Petitioners an opportunity to rebut the data as required by Section 7 (d) of the Act. We submit that these claims are devoid of substance.

Although Petitioners' contentions are broadly stated by them, they have nothing whatever to do with the Commission's findings (1) that the uniform rate is unduly discriminatory and preferential; (2) that the only practical and equitable method of eliminating the undue discrimination and preference is the division of Northern's system into service zones with zone rate differentials; (3) that the system should be divided into three zones as heretofore described; and (4) that the allocation procedure employed by the Commission's Staff, with minor modifications, should be used in allocating costs to each of the zones established.

This is borne out by a mere reading of Opinion No. 281 (R. I. 93-132). Pages 98 (R. I.) through the first paragraph on page 112 (R. I.) are devoted to the first and second questions; that is, (1) are the uniform rates unduly discriminatory and preferential, and (2) the remedy. To the extent that figures are employed, they are the 1954 figures used by all parties during the course of the hearings and there is no question but that they are in the record.

Beginning on page 112 (R. I.) and continuing to the first partial paragraph on page 119 (R. I.) Opinion No. 281 is devoted to the division of the system into zones. Here again there is no question but that the facts are of record. Likewise 1954 figures are used. Finally, the balance of page 119 (R. I). through the first paragraph on page 123 (R. I.) are devoted to a discussion of the allocation procedures which involved only the cost of service figures in Docket No. G-2217.

Let us then consider Petitioners' contention in their appropriate narrow compass. So considered, it is clear that Petitioners have suffered no aggrievement by the limited use of the figures in Docket G-2505. In the absence of aggrievement there is obviously no denial of due process.

Under the terms of the Commission's order, and the rates filed by Northern in compliance with the order, Northern continued to collect, and the zone rates provided, the full amount requested by Northern in its fifth rate increase application filed in Docket No. G-2505. Northern, therefore, is not aggrieved by the order.

Nor are the other Petitioners aggrieved. Subsequent hearings were had in Docket No. G-2505, and all parties herein participated in those proceedings. The evidence disclosed facts which enabled the parties to reach an agreement upon which the Commission entered its order effective as of June 27, 1956. This order reaffirmed the zones and zone boundaries previously established and fixed the zone differential at 2c per Mcf subject to the Stay Order issued by the United States Court of Appeals for the Eighth Circuit and final determination on the appeal from the Commission's order No. 281 here under review.

Furthermore, there was no denial of due process for several other reasons. One, the use of the Docket No. G-2505 figures was justified by the terms of the settlement statement between the parties; and two, because the Commission's action was a lawful exercise of its authority under the Natural Gas Act. *Northern Natural Gas Com-*

pany, Docket No. G-1881, Order issued July 30, 1952, affirmed, *Northern Natural Gas Co. v. Federal Power Commission,* 206 F. 2d 690, 715-716, C. A. 8th (1953), cert. denied 346 U. S. 922.

As to the terms of the settlement in Docket No. G-2217, it was agreed by the parties, and approved by the Commission (R. I. 121) that:

> "* * * if so required by decision of the Commission on further hearings herein, Northern shall incorporate in revised rate schedules filed to become effective on and after December 27, 1954, the methods and principles found by the Commission, subject to judicial review, to be proper as to zones and rate differentials, with due regard to the recovery of reasonable cost of service."

Subsequent to the close of the hearings held on the zone issue pursuant to this settlement agreement, Northern, on July 2, 1954, filed rate schedules in Docket No. G-2505 designed to provide an increase in revenues from jurisdictional sales of $8,128,405, or 10.4 per cent. This was over and above the revenues estimated to be produced by the uniform rates allowed to become effective under the settlement agreement approved by the order of January 28, 1954, in Docket G-2217.

By order issued July 29, 1954, in Docket No. G-2505, the proposed increase was suspended for the maximum period of five months allowed by the Natural Gas Act, Section 4 (e). Thereafter, on motion of Northern, as provided in the Act (id.) the proposed increased uniform rates became effective as of December 27, 1954, subject, however, to the condition that Northern should refund, with interest, the portion of the increased rates as the

Commission on final determination of the case finds unjustified.

When the Commission decided the zone issue in this case, the only "revised rate schedules filed to become effective on and after December 27, 1954," in which the zoning decision could be given effect, were those filed in Docket No. G-2505. Obviously, then, these were the only rate schedules in which "the methods and principles found by the Commission * * * to be proper as to zones and rate differentials" could be incorporated and only on the basis of the claimed cost of service in that docket.

Indeed, an order directing Northern to reflect the principles and methods in the rate schedules filed pursuant to the settlement agreement (G-2217) would have been a futile, if not an impossible act. Plainly, neither the settlement agreement nor the Act contemplates acts of futility.

This brings us to the next proposition which is, that the application of the principles and methods to the rate schedules in Docket No. G-2505 was a lawful exercise of the Commission's authority apart from the terms of the settlement agreement. We have here, with no material differences, the situation presented in *Northern Natural Gas Company v. Federal Power Commission,* 206 F. 2d 690, 715-716, C. A. 8th. Certiorari denied 346 U. S. 922.

The fact is, that the Commission instead of determining the rate differential could simply have directed Northern to give effect to the zones and allocation principles set forth in Opinion No. 281 in the rate schedules filed in Docket No. G-2505. This was the procedure sus-

tained in *Northern Natural Gas Company v. Federal Power Commission,* supra. Northern would have been compelled to do so and if the Commission had followed that course, Northern would have had to establish a rate differential far in excess of 2c per Mcf. The course followed by the Commission was more equitable to the Petitioners (No. 459) and at the same time fully protected Northern.

The Commission had before it ample and sufficient evidence of rate differentials between zones. Staff witness Curry submitted an exhibit (No. 121, R. III, 565), showing the rate differentials under various zone plans which he proposed. The witness Davis testified as to rate differentials between zones in the zone plan which he sponsored. He submitted Exhibit 94 (R. III. 58) which set forth such differentials.

The Commission had evidence in the record before it from which computations could be made as to rate differentials. This record evidence justified the Commission in fixing a differential greater than the 2c differential ordered. Therefore, if the Commission considered matters in the Commission's file which were not in evidence in this proceeding, the Petitioners were not denied due process. In this connection we find the statement of the Supreme Court of the United States in *Market Street Railway Co. v. Railroad Commission of California* (1945), 324 U. S. 548, to be most persuasive and controlling.

In the case of *Market Street Railway Co. v. Railroad Commission,* supra, an order of the California Railroad Commission reducing the fares charged by the Railway

Company was under attack. In arriving at its decision the Commission had considered the operating revenues of the company for the eight months period in 1943, as shown by the reports filed with the Commission by the Railway Company. These filings were subsequent to the hearing in the rate matter. The Railway Company contended that the consideration of such information constituted a denial of due process. The Supreme Court held that there was no denial of due process in the absence of a showing of prejudice. The Court said (324 U. S. at 561-562):

> "Challenged upon the ground that the operating revenues from January to August of 1943 were not in the record, the Commission admitted that these figures were taken from the appellant's monthly reports filed with the Commission. It contended that even if it was in error to refer to such reports, the error was harmless, since the record without the figures supported the reasonableness of the six-cent fare and it was therefore immaterial that the Commission used some additional figures. No contention is made here that the information was erroneous or was misunderstood by the Commission, and no contention is made that the Company could have disproved it or explained away its effect for the purpose for which the Commission used it. The most that can be said is that the Commission in making its predictive findings went outside of the record to verify its judgment by reference to actual traffic figures that became available only after the hearings closed. It does not appear that the Company was in any way prejudiced thereby, and it makes no showing that, if a rehearing were held to introduce its own reports, it would gain much by cross-Examination, rebuttal, or impeachment of its own auditors or the reports they had filed. Due process, of course,

requires that commissions proceed upon matters in evidence and that parties have opportunity to subject evidence to the test of cross-examination and rebuttal. But due process deals with matters of substance and is not to be trivialized by formal objections that have no substantial bearing on the ultimate rights of parties. The process of keeping informed as to regulated utilities is a continuous matter with commissions. We are unwilling to say that such an incidental reference as we have here to a party's own reports, although not formally marked in evidence in the proceedings, in the absence of any showing of error or prejudice constitutes a want of due process."

To the same effect, see *State of Wisconsin v. Federal Power Commission,* C.A., D.C. (1952), 201 F. 2d 183, 186.

The Market Street Railway case, supra, was followed and cited by the United States Supreme Court in *United States v. Pierce Auto Freight Lines,* 327 U. S. 515, decided March 11, 1946. The Court, after reviewing the cases cited by the Petitioners in the case at bar and considering the requirements of a fair hearing, said:

"But in doing so it has not undertaken to make a fetish of sticking squarely within the four corners of the specific record in administrative proceedings or of pinning down such agencies, with reference to fact determinations, even more rigidly than the courts in strictly judicial proceedings. On the contrary, in the one case as in the other, the mere fact that the determining body has looked beyond the record proper does not invalidate its action unless substantial prejudice is shown to result. Market Street R. Co. v. Railroad Commission, 324 U. S. 548, 561, 562, 89 L. Ed. 1171, 1181, 1182, 65 S. Ct. 770; cf. Opp. Cotton Mills v. Administrator of Wage & Hour Division, 312 U. S. 126, 154, 155, 85 L. Ed. 624, 640, 641, 61 St. Ct.

524. In these cases no more is necessary than to apply that rule."

In the case of *Federal Power Commission v. Hope Natural Gas Company* (1944), 320 U. S. 591, the pipeline company contended that the Commission used the wrong formula in arriving at the rate fixed. This Court held (320 U. S. a 602):

> "And when the Commission's order is challenged in the courts, the question is whether that order 'viewed in its entirety' meets the requirements of the Act. ID. p. 586. Under the statutory standard of 'just and reasonable' it is the result reached not the method employed which is controlling * * * (citing cases). It is not theory but the impact of the rate order which counts. If the total effect of the rate order cannot be said to be unjust and unreasonable, judicial inquiry under the Act is at an end. The fact that the method employed to reach that result may contain infirmities is not then important. Moreover, the Commission's order does not become suspect by reason of the fact that it is challenged. It is the product of expert judgment which carries a presumption of validity. And he who would upset the rate order under the Act carries the heavy burden of making a convincing showing that it is invalid because it is unjust and unreasonable in its consequences * * * (citing cases)."

This pronouncement has been referred to and applied in many subsequent cases, including *Panhandle Eastern Pipeline Company v. Federal Power Commission* (1945), 324 U. S. 635, 649.

It follows that the Commission in its order complied with the stipulation of the parties. Neither due process was denied nor were the provisions of the Administrative Procedure Act disregarded. In any event, Petitioners have failed to show any aggrievement or prejudice.

QUESTION III.

Petitioners in the statement of the third question claim that the decision of this Court in *Colorado Interstate Gas Company v. Federal Power Commission,* 324 U. S. 581, in affirming the decision of the Federal Power Commission (3 F.P.C. 32) controls the decision in this case.

The question presented to the Commission and the Court in that case as well as the facts there relied on were entirely different from those shown in this record.

The Commission in that case initiated a rate investigation and ordered a reduction in rates. Colorado Interstate was a pipeline extending 254 miles from Clayton, New Mexico to Denver, Colorado. Its market area was confined to 100 miles. The question presented on review involved allocation of costs between jurisdictional and nonjurisdictional sales.

The issue was not zone rates for jurisdictional sales, but rather the question of separate treatment for large nonjurisdictional sales in the Pueblo area.

Northern's system extends 800 miles, with deliveries made for resale along the entire length of the line. The Commission found that the uniform system-wide rate imposed by Northern was unduly discriminatory and preferential and thus unlawful. No such issue was presented in the Colorado Interstate case.

While there was no issue of zone rates before the Supreme Court on that appeal, the Commission in its decision and order did find that the Colorado Interstate case involved three pipeline companies—Canadian River,

which transported gas from the fields in Texas to Clayton, New Mexico, where it delivered gas to Colorado Interstate. This latter company served the area from Clayton, New Mexico to Denver, and then sold gas near Denver to Colorado-Wyoming Gas Company, which company served the area from Denver to Cheyenne.

The Commission, in effect, established three rate zones with substantial rate differences, although the Commission stated (3 F. P. C. 33, 61):

> "The entire project although involving facilities of three corporate entities, is, for all practical purposes, a single project now designed to produce, gather, transmit and sell natural gas from the Texas Panhandle field to New Mexico along the line as far north as Cheyenne."

The Commission found that the average cost for sales to other utilities in the three zones were as follows: (3 F.P.C. 33, 63, 65):

Canadian River	5.0c
Colorado Interstate	15.1c
Colorado-Wyoming	31.5c

The Commission ordered the respective pipelines to file rates reflecting costs and the Commission's decision was affirmed by this Court.

The customers located on the Denver-Cheyenne portion of the line continue to pay considerably higher rates than those customers located closer to the source of supply (R. III, 582).

The Colorado Interstate case recognized the principle of zone rates, that is, that a rate should be based on the cost of service and zone rates should be established where

substantial differentials exist in the cost of transmission. True, there was a single rate on Colorado Interstate's short line, but their two affiliates had separate rates, one a lesser amount nearer the fields, the other much larger more distant from the fields.

This Court in the Colorado Interstate case affirmed the Commission's decision on the question of allocation of costs between jurisdictional and nonjurisdictional sales. In so doing this Court said:

> "Congress indeed prescribed no formula for determining how the interstate wholesale business whose rates are regulated, should be segregated from the other phases of the business whose rates are not regulated. Rate-making is essentially a legislative function. * * * Congress to be sure has provided for judicial review of the Commission's orders. * * * But that review is limited to keeping the Commission within the bounds which Congress has created. * * * Under this Act the appropriateness of the formula employed by the Commission in a given case raises questions of fact not of law."

In the instant case the Commission, after extended hearings, made a finding of fact that the uniform system-wide rates of Northern were unduly discriminatory and preferential. That question therefore is not now open to review, nor is it challenged by Petitioners here.

An administrative commission must render its decision based upon the facts in each particular case. This the Commission did here. In so doing it cannot be said to be in conflict with the Colorado Interstate case. A study of that decision will clearly disclose that the facts and issues there presented were entirely different than those which the Petitioners here seek to have reviewed.

SUMMARY

The Federal Power Commission, based on record evidence, determined the fact to be that Northern's uniform system-wide rate was unduly discriminatory, preferential and unlawful, which finding is not in issue.

The Commission had the power under Section 5 (a) of the Natural Gas Act to correct the unlawful rate and to order Northern to file a schedule of rates which would remove the discrimination and preference found to exist. Section 5 (a) *requires* the Commission to determine the just and reasonable rate to be thereafter observed and in force. The proviso in Section 5 (a) is not a limitation on the power of the Commission to act as it did.

The Commission had the power to order an interim rate to be effective until a full hearing and decision could be had in the then pending new rate case.

The Federal Power Commission in its Opinion and Order No. 281 retained jurisdiction to make a final order in a subsequent hearing, after having determined the essential question that Northern's uniform system-wide rate was unduly discriminatory and preferential. Such an order has been made (Docket G-2505, effective June 27, 1956).

Neither due process nor the Administrative Procedure Act have been shown to have been violated by such interim determination (its Opinion and Order No. 281) nor have petitioners herein shown themselves to be either aggrieved or prejudiced.

The decision of this Court in *Colorado Interstate Gas Company v. Federal Power Commission,* supra, is not

controlling for the reason that neither the issues involved nor the facts set forth are in point here. That was a case of allocation of cost and not one involving unlawful rates that were unduly discriminatory or preferential.

These intervenors-respondents respectfully submit that no special and important reasons have been set forth in either of the petitions for writ of certiorari which would cause this Court to grant a review of the decision of the United States Court of Appeals for the Eighth Circuit rendered in this case on July 9, 1956. Therefore said petitions should be denied.

Respectfully submitted,

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In the Supreme Court of the United States

OCTOBER TERM, 1956

No. 459

INTERSTATE POWER COMPANY, ET AL., PETITIONERS

v.

FEDERAL POWER COMMISSION

No. 476

NORTHERN NATURAL GAS COMPANY, PETITIONER

v.

FEDERAL POWER COMMISSION

ON PETITIONS FOR WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE FEDERAL POWER COMMISSION IN OPPOSITION

OPINIONS BELOW

The opinion, findings, and order of the Federal Power Commission (Pet. App.,[1] pp. 18–55) are reported in 9 P. U. R. 3d 8. The opinion of the Court

[1] While the opinions are printed as appendices to the petitions in both No. 459 and No. 476, we shall cite for convenience only to the opinions as reprinted in No. 459 and refer to them as Pet.

of Appeals (Pet. App., pp. 56–81) is reported at 236 F. 2d 372.

JURISDICTION

The judgment of the Court of Appeals was entered on July 9, 1956 (Pet. App., p. 82). Petitions for rehearing, seasonably filed, were denied on August 10, 1956 (R. IV, pp. 65, 88). The petition for a writ of certiorari in No. 459 was filed on September 27, 1956, and that in No. 476 was filed on October 3, 1956. The jurisdiction of this Court is invoked under 28 U. S. C. 1254 (1) and Section 19 (b) of the Natural Gas Act, 15 U. S. C. 717r (b).

QUESTIONS PRESENTED

1. Whether the proviso in Section 5 (a) of the Natural Gas Act, prohibiting the Commission from directing an increase in a filed rate unless in accordance with a new schedule filed by the company, precludes the Commission from ordering a natural-gas company to file schedules adopting a specified differential in rates between prescribed zones designed to produce total revenues "not to exceed" a stated amount, where the Commission has found (after hearing) that the company's existing uniform system-wide rates are unlawfully discriminatory and preferential, and that zone differentials in rates will eliminate the discrimination and preference.

App. The record references are to the three volume Record filed in the Court of Appeals in Civil Nos. 15,412 and 15,424. This record, supplemented by Volume IV to include the proceedings in the court below, was filed in this Court by the petitioners in No. 459, and serves as a single consolidated record in both cases.

2. Whether, in fixing zone rate differentials on an interim basis, the Commission's use (as an aid in determining the differential in cost of service between the zones fixed by the Commission) of extra-record data filed by the company in other proceedings before the Commission violates the Due Process Clause or the Administrative Procedure Act, where (*a*) such use tended to favor petitioners, (*b*) petitioners do not allege any prejudicial error in the cost differential so determined and (*c*) the extra-record evidence so used could be controverted by petitioners and any prejudicial error thereby disclosed could be fully rectified (by refund) in the other proceeding.

3. Whether the decision below, in upholding the Commission's method of allocating costs of service among customers at varying distances from the gas source, is in conflict with *Colorado Interstate Gas Co.* v. *Federal Power Commission,* 324 U. S. 581.

STATUTES INVOLVED

The pertinent provisions of the Natural Gas Act of 1938, 52 Stat. 821, as amended, 15 U. S. C. 717 *et seq.*, and of the Administrative Procedure Act, 60 Stat. 237, 5 U. S. C. 1001 *et seq.*, are set forth in the Appendix, *infra,* pp. 20–25.

STATEMENT

Both of these petitions seek review of the same decision of the Court of Appeals for the Eighth Circuit in which that court affirmed an order of the Federal Power Commission requiring Northern Natural Gas Company to establish zone rate differentials for all of the sales subject to the Commission's rate

jurisdiction, made by Northern from its interstate natural-gas pipeline system.

The order was entered in a rate proceeding (Docket No. G–2217) initiated by the Commission on July 24, 1953, at the same time that it suspended an increase proposed by Northern in all of its rates subject to the Commission's jurisdiction. Certain customers of Northern intervened and complained that Northern's existing rate structure of uniform system-wide rates applicable to all its sales for resale was unduly discriminatory as to them and preferential as to others, in violation of the Natural Gas Act (R. I. 145, 157). On January 28, 1954, the Commission approved a Stipulation for Settlement (R. I. 145–154), agreed to by all the parties, which settled all the issues in the proceeding except that of zone differentials in rates, and reserved that issue for further hearings (R. I. 155–166). In accordance with this approved Stipulation, Northern filed revised rate schedules (with uniform rates) which were made effective as of December 27, 1953 (R. I. 215, 225).

Since it was contemplated that Northern would file an additional rate increase proposal to be effective December 27, 1954, the Stipulation for Settlement also provided (Pet. App., pp. 43–44, 51):

> * * * that the decision of the Commission respecting such issue of service zones and rate differentials, if it requires a change in the * * * rate schedules * * *, shall not be made effective prior to December 27, 1954, nor result in revenues less than the agreed cost of service. It is also agreed that, if so required by decision of

> the Commission on further hearings herein, Northern shall incorporate in revised rate schedules filed to become effective on or after December 27, 1954, the methods and principles found by the Commission, subject to judicial review, to be proper as to zones and rate differentials, with due regard to the recovery of reasonable cost of service.

On July 2, 1954, Northern did propose additional rate schedules designed further to increase its sales revenues by $8,128,405 annually. A new proceeding (Docket No. G–2505) was initiated by the Commission, in which those proposed rate increases were suspended under Section 4 (e) of the Act, *infra,* p. 20, until December 27, 1954, when they became effective, subject to such refunds as might thereafter be ordered by the Commission.

Meanwhile, after hearings on zone rate differentials in Docket No. G–2217 (the instant proceeding), the Presiding Examiner, on November 18, 1954, filed a decision finding that Northern's uniform system rates had not been shown to be unduly discriminatory and preferential, and that the "public interest does not now require the establishment of service zones or zone rates" (R. I. 90). Following exceptions and oral argument, the Commission, on May 20, 1955, issued its Opinion and Order here involved (Pet. App., pp. 18–55), in which it found that Northern's system-wide uniform rates were unduly discriminatory and preferential and therefore unlawful; that zone differential rates would be the most effective and equitable means of eliminating such discrimination and preference; that three zones which it defined by reference to a map

of the system (Pet. App., p. 41) should be established;[2] and that Northern should design and file revised rates for each zone with differentials approximating 2¢ per Mcf between zones, the rates to produce total revenues not to exceed a specified amount ($86,538,101) and to become effective May 27, 1955,[3] subject to such refund as the Commission might thereafter order in Docket No. G–2505 (*supra,* p. 5) (Pet. App., pp. 53–54).

In arriving at the differentials in rates which it required Northern to make effective "on an interim basis, subject to subsequent adjustment and possible refund" (Pet. App., pp. 47, 50–54), the Commission referred to filings made by Northern in Docket No. G–2505 (the proceeding involving Northern's new rate increase, *supra,* p. 5), and in Docket G–2063 (a proceeding on Northern's application for a certificate for facilities and service including those for a number of additional customers);[3a] the Commission observed that it "would be inappropriate and improper" to

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[2] The zone boundaries fixed by the Commission (Pet. App., pp. 39–42) are substantially the Commission Staff's Proposal B (Pet. App., p. 37), with modifications to avoid the objection, advanced to that and the other zone proposals, that they would have fixed zone boundaries by selected points on the main stem trunk transmission lines. Under those proposals all branches taking off between the two points on the trunk bounding one zone would be included in that zone, although delivery points on some of the longer branches might be farther from the source than some delivery points closer to the trunk in the next higher zone. Pet. App., p. 38. The Commission met this objection by drawing zone boundaries to include in the same zone all equi-distant delivery points, as nearly as reasonably possible. Pet. App., pp. 40–42.

[3] Subsequently changed to June 27, 1955, at Northern's request.

[3a] In Docket G–2063 the Commission has issued a certificate and Northern had filed a report showing progress of construction as of December 17, 1954.

require in the proceeding before it "that Northern file substitute revised tariff sheets to be made effective as of a retroactive date or based upon a cost of service less than that claimed by Northern" in Docket No. G–2505 (Pet. App., p. 46). Accordingly, applying the methods of cost classification and allocation previously found proper, and with the aid of data as to cost of service, volume of sales, and mileage-demand of new sales filed by Northern in Dockets No. G–2505 and G–2063, the Commission calculated that the cost in Zone 3 (in which petitioners in No. 459 are located) would be about 3.06¢ higher than that in Zone 2. However, the Commission noted that this differential was calculated on the basis of the cost claimed by Northern in Docket No. G–2505, which, "in certain respects at least is not in accord with prior decisions of the Commission in proceedings involving rates of Northern, and * * * past experience indicates the possibility that Northern may not be able to fully support its claimed cost of service." For this reason, the Commission concluded "that the maximum differential in rates to be made effective at this time on an interim basis, subject to subsequent adjustment and possible refund [in the proceedings in Docket No. G–2505], should be about 2.00 cents per Mcf." (Pet. App., pp. 46–47). Without fixing the level of rates, the Commission therefore ordered Northern to design and file revised rate schedules to provide differentials between zones of "approximately 2.00 cents per Mcf." The order also provided that these schedules should "be designed so as to produce to Northern total revenues from sales of natural gas, subject to the juris-

diction of the Commission, not to exceed $86,538,101,"[4] and that they should be made effective, "subject to such refunds as may be hereafter ordered by the Commission * * * in Docket No. G–2505" (Pet. App., pp. 53–54).[5]

On review, the Court of Appeals, in an extensive and carefully considered opinion, concluded that the Commission had acted in a matter within its jurisdiction, that the Commission's findings are supported by substantial evidence and are not contrary to the evidence, and that the Commission's conclusions are not contrary to law or erroneous. Accordingly, the court affirmed the Commission's order in all respects (Pet. App. pp. 56–81).

ARGUMENT

1. The petitioners in No. 459 claim that the Commission violated the proviso in Section 5 (a) of the Natural Gas Act, *infra,* pp. 21–22,[6] when it ordered that

[4] In its filing in Docket No. G–2505, Northern claimed that the jurisdictional cost of service was $86,538,101 (Pet. App., pp. 45–46). This is to be compared with the amount of $73,083,254 which was the jurisdictional cost of service agreed upon in the Stipulation for Settlement and which, by agreement, was the only cost of service figure used in the further proceedings in Docket No. G–2217 leading up to the Commission order (Pet. App., pp. 44–45).

[5] Two members of the Commission dissented solely because they believed that the rate differential should be more than 2 cents per Mcf (Pet. App., pp. 54–55):

"In our view it would be more equitable to establish an initial differential of 2½ cents. This would be subject to further consideration and adjustment in Docket No. G–2505 should the evidence therein show that such differential should be modified."

[6] The proviso reads in pertinent part:

"* * * *Provided, however*, That the Commission shall have no power to order any increase in any rate contained in the cur-

"Northern *shall* file [petitioners' emphasis] revised tariff sheets" providing rates with 2¢ differentials between zones and producing *"not to exceed"* [emphasis ours] a specified total annual revenue (the amount of which is not in controversy). Pet. No. 459, pp. 6, 2–3, 9–12. But the contention is predicated on the erroneous assumption that requiring Northern to file revised rates which are not unduly discriminatory or preferential is the equivalent of requiring it to file new rates in excess of those it proposed. While the proviso prevents the Commission from *ordering* an increase, it does not bar it in proper circumstances from *authorizing* one. This was explicitly recognized in *United Gas Pipe Line Co.* v. *Mobile Gas Service Corp.*, 350 U. S. 332, where the Court stated (350 U. S. at 345):

> * * * if the Commission, after hearing, determines the contract rate to be so low as to conflict with the public interest, it may under § 5 (a) authorize the natural gas company to file a schedule increasing the rate.

By ordering that the rate schedules to be filed should be designed to produce revenues not to exceed the jurisdictional cost of service claimed by Northern in Docket No. G–2505 (see *supra,* pp. 5–6, 7–8), the Commission did not require the filing of rates at any particular level, whether above or below the existing level, but only that they be so molded that the total revenues

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rently effective schedule of such natural-gas company on file with the Commission, unless such increase is in accordance with a new schedule filed by such natural gas company; but the Commission may order a decrease where existing rates are unjust, unduly discriminatory, preferential, otherwise unlawful, or are not the lowest reasonable rates."

should not exceed the permissible maximum.[7] Northern could have satisfied the order by filing rates, with the 2¢ differentials, at such levels that the highest one would not exceed the rate previously in effect.

The petitioners in No. 459 further argue, on the basis of *Mobile, supra,* that the Commission's findings of undue discrimination (Pet. App., pp. 35–36, 50) were not sufficient to support any increase in a contracted rate because not amounting to a finding that the contracted rate was "so low as to conflict with the public interest." Pet. No. 459, p. 10. But this overlooks *Federal Power Commission* v. *Sierra Pacific Power Co.,* 350 U. S. 348 (the companion case to *Mobile*) which makes plain that a rate that is so low as to constitute an unduly discriminatory rate is, in the view of the statute, "so low as to conflict with the public interest" (350 U. S. at 355):

> * * * the sole concern of the Commission would seem to be whether the rate is so low as to adversely affect the public interest—*as where it might* impair the financial ability of the public utility to continue its service, *cast upon other consumers an excessive burden, or be unduly discriminatory.* [Emphasis added.]

The Commission's finding here fully satisfies this test; it reads (Pet. App., pp. 35–36):

> * * * Northern's present practice of demand-

[7] The requirement that a rate be filed which will produce not to exceed a specified total revenue (or effectuate not less than a specified reduction in total revenue) is within the Commission's power under Section 5 (a) to "fix the just and reasonable rate." *Federal Power Commission* v. *Natural Gas Pipeline Co.,* 315 U. S. 575, 584, affirming 2 F. P. C. 218, 235.

> ing and collecting uniform rates throughout the length and breadth of its area of service for the sale of natural gas for resale is unjust, unreasonable, unduly discriminatory, and preferential. This practice results in the shifting of transmission cost from those whose service requires its incurrence by reason of the greater transportation distances to others who are not responsible for such cost—and who are not benefited correspondingly.

Thus, it is clear that the Commission's action is not contrary to Section 5 (a) or its proviso.

2. (*a*) Petitioners in No. 459 also urge (and in this Northern, in No. 476, joins)[8] that the Commission's action in utilizing extra-record evidence is contrary to the Administrative Procedure Act and the Due Process Clause of the Constitution (Pet. No. 459, pp. 12–15, Pet. No. 476, pp. 14–25). But the Commission made very little use of such evidence, which was favorable to petitioners, and, in any case, its action in no way prejudiced petitioners, for it simultaneously afforded them full opportunity to controvert the extra-record evidence in Docket No. G–2505 in which the ordered rates were still subject to adjustment and appropriate refunds.

The Commission used extra-record evidence—consisting of data as to cost of service, volume of sales, and mileage demand of new sales—solely to obtain the differential in cost of service between two zones in order to aid it in fixing the zone rate differentials. No extra-record evidence was used in connection with

[8] This is the only question presented in No. 476 (see Pet. 2, 14–25).

the Commission's findings as to discrimination, or the elimination of discrimination by zone rates, or as to the location of zone boundaries.

Based on the record evidence for the zones contemplated by Staff Proposal B (n. 2, *supra,* p. 6), prior to their modification by the Commission, the costs in Zone 3 (where the petitioners in No. 459 are located) would have been about 5.9¢ per Mcf higher than those in Zone 2.[9] By modifying the zones and using the extra-record evidence, the Commission reduced the spread to only 3.06¢ per Mcf. Anticipating a possible reduction in Northern's claimed cost of service (Pet. App., p. 47) (see *supra,* p. 7), the Commission allowed a margin for that possibility and fixed the rate differential at 2¢, to avoid any prejudice to petitioners in No. 459 (Pet. App., pp. 46–47). Two commissioners dissented from allowing so large a margin, believing the rate differential should be fixed at 2½¢ (Pet. App., pp. 54–55) (*supra,* p. 8, fn. 5). It is thus plain that the use of the extra-record evidence was favorable, not adverse, to petitioners who were interested in rates as nearly uniform as possible. (Pet. App., pp. 47, 54–55.)

Moreover, none of the petitioners has at any time claimed that the 3.06¢ cost differential derived from the extra-record data is erroneously high. While both Northern (Pet., No. 476, pp. 9–13) and petitioners in No. 459 (Pet., pp. 8–9) criticize the sufficiency of the data and the correctness of Commission computations

[9] The 5.9¢ figure was derived from the staff's allocation of cost of service between the zones contemplated by its Proposal B. See particularly Exhibits 119 and 126, R. III, 561, 565.

in certain details,[10] neither petition alleges that more data or better use thereof would have reduced the 3.06¢ differential.

In any case, contrary to petitioners' contentions, they were afforded the fullest opportunity to controvert the extra-record data used. This the Commission did by ordering that the prescribed differentials be applied to rates to be substituted for those Northern was already collecting under bond in Docket No. G–2505, subject to appropriate refunds if any portion were ultimately found unjustified after the hearing in that proceeding (Pet. App., p. 54). See *supra,* pp. 6–8. The result was that if any of the petitioners had any evidence to controvert that data they could introduce it there, and if, upon consideration of that evidence, or any other evidence in that record, it should appear that the 2¢ rate differential was unduly discriminatory or preferential to any customer, the Commission could fix the just and reasonable rate in that proceeding. Upon such a determination Northern was obligated, under its bond, to make refunds which would give retroactive effect to the Commission's correction of its earlier action.[11]

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[10] *I. e.*, location of takeoff points of sublateral lines, sales volume data by zones, more particularized computations of costs to serve particular customers, based on exact pipe sizes used to serve each.

[11] Petitioners did not take advantage of this opportunity. On July 26, 1956, the Commission issued an order in *Matter of Northern Natural Gas Co., et al.*, Docket Nos. G–2505, G–9409, G–9410, approving a settlement of that other proceeding fixing prospective rates, subject to final decision upholding the Commission's order in the instant case. By not availing themselves in that proceeding of the opportunity afforded to controvert the extra-record evidence which the Commission utilized in this case, peti-

Thus, while resolving in this proceeding the large issues as to whether the uniform rate was discriminatory and, if so, whether zone rate differentials would eliminate the discrimination, and how to establish zone boundaries, the Commission left open for possible subsequent correction (and refund) in the other case, any error that might have resulted here from its use of the extra-record data in fixing the amount of the rate differential between zones. Such a step-by-step procedure and granting of immediate relief, subject to later readjustment, is the kind of process this Court has long regarded favorably. Cf. *Federal Power Commission* v. *Natural Gas Pipeline Co.*, 315 U. S. 575, 583–586; *New England Divisions Case*, 261 U. S. 184, 201. The procedure has not only not prejudiced the petitioners but it has facilitated the orderly and prompt disposition of an important and vigorously disputed general issue in the continuing series of interrelated controversies necessarily entailed in the attempt to regulate the rates of a natural-gas pipeline system as extensive, complex, and rapidly changing as Northern's.[12] Accordingly, there has been no violation of due process or the requirements of the Administrative Procedure Act. *Market Street Ry. Co.* v. *Railroad Commission of California*, 324 U. S. 548, 561–

tioners have, in effect, conceded the want of substance to their present contention.

[12] There being neither prejudice nor failure to accord full opportunity to controvert the extra-record evidence, the cases relied on by petitioners (Pet. No. 459, pp. 13–14; Pet. No. 476, pp. 20–24), in which there was substantial prejudice and refusal or failure to afford such an opportunity, are irrelevant.

562;[13] *United States* v. *Pierce Auto Lines,* 327 U. S. 515, 530.

(*b*) As a facet of its claim of violation of due process and the Administrative Procedure Act, Northern contends that the boundaries of the zones were arrived at "without notice" (Pet., No. 476, 15). But this objection amounts to no more than a claim that there was no specification in the notice of hearing of the precise zone boundaries finally defined by the Commission, and no hearing *on them,* because the Commission's final order did not precisely follow any of the proposals as to the location of zone boundaries put in evidence

[13] As stated in the *Market Street Ry Co.* case (324 U. S. at 561–562):

"No contention is made here that the information was erroneous or was misunderstood by the Commission, and no contention is made that the Company could have disproved it or explained away its effect for the purpose for which the Commission used it. The most that can be said is that the Commission in making its predictive findings went outside of the record to verify its judgment by reference to actual traffic figures that became available only after the hearings closed. It does not appear that the Company was in any way prejudiced thereby, and it makes no showing that, if a rehearing were held to introduce its own reports, it would gain much by cross-examination, rebuttal, or impeachment of its own auditors or the reports they had filed. Due process, of course, requires that commissions proceed upon matters in evidence and that parties have opportunity to subject evidence to the test of cross-examination and rebuttal. But due process deals with matters of substance and is not to be trivialized by formal objections that have no substantial bearing on the ultimate rights of parties. The process of keeping informed as to regulated utilities is a continuous matter with commissions. We are unwilling to say that such an incidental reference as we have here to a party's own reports, although not formally marked in evidence in the proceeding, in the absence of any showing of error or prejudice constitutes a want of due process."

by any expert testifying in the case, or any boundary previously mentioned in the proceeding. Due notice does not, however, have to anticipate the final resolution of the issues posed, so long as there is notice and knowledge that the agency is dealing with a particular subject such as the zone differentials involved here. *Civil Aeronautics Board* v. *State Airlines, Inc.*, 338 U. S. 572, 578–581; *Tagg Bros.* v. *United States*, 280 U. S. 420, 438–440; *United States* v. *Wrightwood Dairy Co.*, 127 F. 2d 907. And due process does not confine a regulatory commission to the precise conclusions laid before it, for expert testimony is merely "in the nature of argument or opinion, and the weight to be given it would depend upon the Commission's estimate of the reasonableness of their conclusions and the force of their reasoning." *Market Street Ry. Co.* v. *Railroad Commission of California, supra,* at 560.

Nor does the Administrative Procedure Act so confine the Commission, either by Sections 7 (c) and 7 (d), *infra,* pp. 24–25, which require that Commission decision be based exclusively on the record, or Section 4 (a),[14] which specifies that notice must be given setting forth "*either* the terms *or* substance of the proposed rule *or* a description of the subjects and issues involved" (emphasis added). *Colorado Interstate Gas Co.* v. *Federal Power Commission,* 209 F. 2d

[14] Section 4 of the Administrative Procedure Act applies to "rule making" which, as defined in Section 2 (c) of that Act, *infra,* pp. 23–24, includes also "any agency statement of * * * particular applicability and future effect designed to implement, interpret or prescribe law or policy * * * and includes the approval or prescription for the future of rates * * * or practices bearing upon any [rate] * * *."

717, 723–724 (C. A. 10), reversed on other grounds, 348 U. S. 442. As for Section 7, the zone boundaries adopted here were based wholly on record evidence; and with respect to Section 4 (a), petitioners would nullify the statutory alternatives by their insistence on notice of the precise boundaries as finally decided and further hearing on those lines before they are fixed.

3. Finally, petitioners in No. 459 contend that the decision below is in "direct conflict" with *Colorado Interstate Gas Co.* v. *Federal Power Commission,* 324 U. S. 581, affirming 142 F. 2d 943 (C. A. 10), affirming 3 F. P. C. 32, (Pet., No. 459, pp. 3, 15–17). The claim of conflict is based on the affirmance in *Colorado Interstate* of an allocation by ~~that~~ the Commission of costs of service on the basis of the company's entire pipeline as a unit, rather than on a mileage demand basis. Sales there were made to an industrial customer at Pueblo and a gas distributing utility at Denver, from a line which extended 254 miles from Clayton Junction, New Mexico, via Pueblo, to Denver. Pet., No. 459, p. 16; 142 F. 2d at pp. 949–950.

That no conflict of decision could be involved is shown by the *Colorado Interstate* opinion itself (324 U. S. at 590):

> Under this Act the appropriateness of the [cost allocation] formula employed by the Commission in a given case raises questions of fact, not of law.

It is simply the variance in facts between the cases which produces the difference between the two decisions. Of 21,000,000 Mcf sold from the line in *Colo-*

rado Interstate, 7,000,000 went to Colorado Fuel and Iron Co. at Pueblo, and 6,000,000 to the gas utility serving Denver. 3 F. P. C. at p. 39. The line would not have been built but for those two markets (3 F. P. C. at p. 37), and it was upon this finding that the Court concluded that it was "fair to determine transmission costs for the pipeline as a whole and not to compute them on a mileage demand basis." 324 U. S. at 591.

Here, the facts are very different. Deliveries are made as far as 600 miles apart (Pet. App., p. 22). Transmission costs, which in the aggregate constitute 55% of Northern's total costs of service (Pet. App., p. 24), increase in close proportion to the length of line of constant size (Pet. App., p. 29). Although sales in Minnesota (the northernmost state served by Northern) benefit the other customers by making possible the use of the more economical, larger diameter pipes, the sales in other states make an equal or greater contribution to the lowered cost of transmission, which benefits the Minnesota customers. Pet. App., p. 30.

Deliveries are made to 15 Kansas points at distances of from 179 to 322 miles, and to 126 points in Nebraska, Iowa, South Dakota and Minnesota, at distances of from 390 to 803 miles from the source (Pet. App., p. 60). While eight sales at from 448 to 803 miles account for 71% of the total of such sales, there is no concentration of sales in any area sufficient to overcome mileage of haul as the controlling cost factor (Pet. App., pp. 32–33). Moreover, the relatively lower load factor of the northern-

most sales disproportionately increases overall transmission cost by decreasing the overall load factor (Pet. App., p. 33).

The sufficiency of the evidence to support the Commission's findings as to these facts was considered at length by the court below. Pet. App., pp. 66–72. That court's conclusion upholding such findings presents no occasion for review by this Court.

CONCLUSION

The affirmance by the court below of the Commission's order presents no conflict of decisions or need for further review. The petitions for writs of certiorari should be denied.

Respectfully submitted,

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APPENDIX

1. The Natural Gas Act of 1938, 52 Stat. 821, as amended, 15 U. S. C. 717 *et seq.* provides in pertinent part:

* * * * *

SEC. 4. * * *

(e) Whenever any such new schedule is filed the Commission shall have authority, either upon complaint of any State, municipality, or State commission, or upon its own initiative without complaint, at once, and if it so orders, without answer or formal pleading by the natural-gas company, but upon reasonable notice, to enter upon a hearing concerning the lawfulness of such rate, charge, classification, or service; and, pending such hearing and the decision thereon, the Commission, upon filing with such schedules and delivering to the natural-gas company affected thereby a statement in writing of its reasons for such suspension, may suspend the operation of such schedule and defer the use of such rate, charge, classification, or service, but not for a longer period than five months beyond the time when it would otherwise go into effect: *Provided,* That the Commission shall not have authority to suspend the rate, charge, classification, or service for the sale of natural gas for resale for industrial use only; and after full hearings, either completed before or after the rate, charge, classification, or service goes into effect, the Commission may make such orders with reference thereto as would be proper in a proceeding initiated after it had become effective. If the proceeding has not been concluded and an order made at the

expiration of the suspension period, on motion of the natural-gas company making the filing, the proposed change of rate, charge, classification, or service shall go into effect. Where increased rates or charges are thus made effective, the Commission may, by order, require the natural-gas company to furnish a bond, to be approved by the Commission, to refund any amounts ordered by the Commission, to keep accurate accounts in detail of all amounts received by reason of such increase, specifying by whom and in whose behalf such amounts were paid, and, upon completion of the hearing and decision, to order such natural-gas company to refund, with interest, the portion of such increased rates or charges by its decision found not justified. At any hearing involving a rate or charge sought to be increased, the burden of proof to show that the increased rate or charge is just and reasonable shall be upon the natural-gas company, and the Commission shall give to the hearing and decision of such questions preference over other questions pending before it and decide the same as speedily as possible.

* * * * *

SEC. 5. (a) Whenever the Commission, after a hearing had upon its own motion or upon complaint of any State, municipality, State commission, or gas distributing company, shall find that any rate, charge, or classification demanded, observed, charged, or collected by any natural-gas company in connection with any transportation or sale of natural gas, subject to the jurisdiction of the Commission, or that any rule, regulation, practice, or contract affecting such rate, charge, or classification is unjust, unreasonable, unduly discriminatory, or preferential, the Commission shall determine the just and reasonable rate, charge, classification, rule, regulation, practice, or contract to be thereafter observed and in force, and shall fix the same by order: *Provided, however,* That the

Commission shall have no power to order any increase in any rate contained in the currently effective schedule of such natural-gas company on file with the Commission, unless such increase is in accordance with a new schedule filed by such natural-gas company; but the Commission may order a decrease where existing rates are unjust, unduly discriminatory, preferential, otherwise unlawful, or are not the lowest reasonable rates.

* * * * *

SEC. 19. * * *

(b) Any party to a proceeding under this Act aggrieved by an order issued by the Commission in such proceeding may obtain a review of such order in the circuit court of appeals of the United States for any circuit wherein the natural-gas company to which the order relates is located or has its principal place of business, or in the United States Court of Appeals for the District of Columbia, by filing in such court, within sixty days after the order of the Commission upon the application for rehearing, a written petition praying that the order of the Commission be modified or set aside in whole or in part. A copy of such petition shall forthwith be served upon any member of the Commission and thereupon the Commission shall certify and file with the court a transcript of the record upon which the order complained of was entered. Upon the filing of such transcript such court shall have exclusive jurisdiction to affirm, modify, or set aside such order in whole or in part. No objection to the order of the Commission shall be considered by the court unless such objection shall have been urged before the Commission in the application for rehearing unless there is reasonable ground for failure so to do. The finding of the Commission as to the facts, if supported by substantial evidence, shall be conclusive. If any party shall apply to the court for leave to adduce additional

evidence, and shall show to the satisfaction of the court that such additional evidence is material and that there were reasonable grounds for failure to adduce such evidence in the proceedings before the Commission, the court may order such additional evidence to be taken before the Commission and to be adduced upon the hearing in such manner and upon such terms and conditions as to the court may seem proper. The Commission may modify its findings as to the facts by reason of the additional evidence so taken, and it shall file with the court such modified or new findings, which if supported by substantial evidence, shall be conclusive, and its recommendation, if any, for the modification or setting aside of the original order. The judgment and decree of the court, affirming, modifying, or setting aside, in whole or in part, any such order of the Commission, shall be final, subject to review by the Supreme Court of the United States upon certiorari or certification as provided in sections 239 and 240 of the Judicial Code, as amended (U. S. C., title 28, secs. 346 and 347).

* * * * *

2. The Administrative Procedure Act, 60 Stat. 237, 5 U. S. C. 1001 *et seq.*, provides in pertinent part:

* * * * *

SEC. 2. * * *

* * * * *

(c) RULE AND RULE MAKING.—"Rule" means the whole or any part of any agency statement of general or particular applicability and future effect designed to implement, interpret, or prescribe law or policy or to describe the organization, procedure, or practice requirements of any agency and includes the approval or prescription for the future of rates, wages, corporate or financial structures or reorganizations thereof, prices, facilities, appliances, services or allowances therefor or of valuations, costs, or

accounting, or practices bearing upon any of the foregoing. "Rule making" means agency process for the formulation, amendment, or repeal of a rule.

* * * * *

SEC. 4. Except to the extent that there is involved (1) any military, naval, or foreign affairs function of the United States or (2) any matter relating to agency management or personnel or to public property, loans, grants, benefits, or contracts—

(a) NOTICE.—General notice of proposed rule making shall be published in the Federal Register (unless all persons subject thereto are named and either personally served or otherwise have actual notice thereof in accordance with law) and shall include (1) a statement of the time, place, and nature of public rule making proceedings; (2) reference to the authority under which the rule is proposed; and (3) either the terms or substance of the proposed rule or a description of the subjects and issues involved. Except where notice or hearing is required by statute, this subsection shall not apply to interpretative rules, general statements of policy, rules of agency organization, procedure, or practice, or in any situation in which the agency for good cause finds (and incorporates the finding and a brief statement of the reasons therefor in the rules issued) that notice and public procedure thereon are impracticable, unnecessary, or contrary to the public interest.

* * * * *

SEC. 7. * * *

* * * * *

(c) EVIDENCE.—Except as statutes otherwise provide, the proponent of a rule or order shall have the burden of proof. Any oral or documentary evidence may be received, but every agency shall as a matter of policy provide for the exclusion of irrelevant, immaterial, or un-

duly repetitious evidence and no sanction shall be imposed or rule or order be issued except upon consideration of the whole record or such portions thereof as may be cited by any party and as supported by and in accordance with the reliable, probative, and substantial evidence. Every party shall have the right to present his case or defense by oral or documentary evidence, to submit rebuttal evidence, and to conduct such cross-examination as may be required for a full and true disclosure of the facts. In rule making or determining claims for money or benefits or applications for initial licenses any agency may, where the interest of any party will not be prejudiced thereby, adopt procedures for the submission of all or part of the evidence in written form.

(d) RECORD.—The transcript of testimony and exhibits, together with all papers and requests filed in the proceeding, shall constitute the exclusive record for decision in accordance with section 8 and, upon payment of lawfully prescribed costs, shall be made available to the parties. Where any agency decision rests on official notice of a material fact not appearing in the evidence in the record, any party shall on timely request be afforded an opportunity to show the contrary.

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